Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HOWARD R. MONTGOMERY, for himself, and derivatively, for the Aetna Plywood, Inc. Profit Sharing Plan, as successor to Aetna Plywood, Inc., Employee Stock Ownership Plan, Nominal Defendant, and as certified representative of the class of participants in the Aetna Plywood, Inc., Employee Stock Ownership Plan during July 1992,

Petitioner,

v.

AETNA PLYWOOD, INCORPORATED, a Delaware corporation, JEFFREY DAVIS, Lawrence Rassin, Keith Weller, Jon Minnaert and Scott Haldin,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether Delaware corporation law's *Revlon* doctrine (that a corporate board's decision to sell the company or effect a change-of-control transaction triggers a heightened duty to maximize value for all shareholders) is part of ERISA's "appropriate equitable relief" assertable by an ESOP class against an attempt to dilute its equity interest by a bargain sale of control to a third party for a mere token consideration.

Whether ERISA recognizes the "equitable standing" doctrine, such that a previously sold-out ESOP class whose equity is being restored in litigation, may assert the *Revlon* doctrine against a transaction that is being affected during the period when the ESOP's legal title to shares was interrupted by the prohibited transaction at issue in the litigation. (That is, after its shares were sold in a prohibited transaction but before they were restored by the litigation over the transaction).

Whether, in an ERISA case in which a court has reserved jurisdiction to enforce the terms of a settlement, the court abuses its discretion in simply refusing to rule on a party's motions to contest defendants' actions which violate the settlement's terms.

In an ERISA case in which, after trial, the court had determined that the ESOP's 95% ownership of the employer was redeemed for less than fair value, and the claims have been settled for cash plus restoration of an equity ownership of the company, plus the right to challenge the fairness of any change-in-control transaction, whether the court errs or abuses its discretion in either (a) simply declining to hear the class' challenge to the company's dilution of the restored

equity by selling 51% control to a competing management group for a mere token amount, or (b) declaring that the class lacks standing to assert the protections of Delaware's *Revlon* fiduciary duty to maximize value for shareholders on a change of control transaction, when the transaction occurred after the class' ESOP shares were wrongfully redeemed, but before the wrongfully sold equity was restored.

RULE 14(b) LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Plaintiff: Howard R. Montgomery, for himself, and as certified representative for the participants in the Aetna Plywood, Inc., Employee Stock Ownership Plan

Defendants: Aetna Plywood, Inc. and Jeffrey Davis

Third party interveners: Lawrence Rassin, Keith Weller, Jon Minnaert and Scott Halden.

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Howard R. Montgomery, for himself and as the certified representative of the class of June 1992 ESOP participants ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

CITATIONS TO THE OPINIONS AND RULINGS BELOW

The opinion of the court of appeals is published as *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399 (7th Cir. 2000). (App. A). The district court's denial of the plaintiff/ class representative's motion to block the company's "reorganization" by selling control to the management group is unreported. (App. B at 30a).

BASIS FOR JURISDICTION IN THIS COURT

The decision sought to be reviewed was entered October 26, 2000. Rehearing and Rehearing en banc, was denied on December 6, 2000. On March 2, 2001, Petitioner filed a request to extend the time to file the petition for a writ of certiorari. On March 6, 2001, Justice Stevens extended the time to April 5, 2001. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2):

> (a) A civil action may be brought . . .
>
> > (2) . . . by a participant . . . for appropriate relief under Section 1109 of this title

ERISA § 409, 29 U.S.C. § 1109(a), provides:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

STATEMENT OF THE CASE AND BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Aetna Plywood Inc., a Delaware corporation, a Chicago-based distributor of wood products, was founded by the Davis and Schwanke families in 1937. An Employee Stock Ownership Plan was created in 1978. Over the years, shareholders who retired, died or otherwise left the company, generally sold their shares to the ESOP. As of June 12, 1992, the company's outstanding shares were owned 95% by the ESOP, and 5% by Jeffrey Davis, grandson of one of the founders. Davis, who was president, CEO and chairman of the ESOP committee, caused the ESOP to sell its 95% ownership block back to the company, making him a 100% owner.

In 1995, Plaintiff, Howard R. Montgomery, a participant in the Aetna Plywood Inc. Employee Stock Ownership Plan, an ERISA retirement plan, filed this action under the Employee Retirement Income Security Act of 1974, asserting that the $85.75 per share price received by the ESOP was far less than fair market value; i.e., for inadequate consideration, rendering the sale a prohibited transaction under ERISA, for which the defendant corporation and directors would be liable for the shortfall. On April 16, 1996, the district court granted class certification. *Montgomery v. Aetna Plywood, Inc.*, 1996 WL 189347 (April 16, 1996 memorandum opinion and order, and July 2, 1996 Opinion on reconsideration). (App. J) Subsequently, the district court granted leave to amend the complaint to add a breach of fiduciary duty claim under Delaware corporate law. *Montgomery v. Aetna Plywood, Inc.*, 956 F. Supp. 781 (N.D. Ill. E.D. Jan. 2, 1997). (App. I at 151a).

During three years of active litigation, the plaintiff and the class not only had to battle with the defendants, who had effected the bargain sale of the employees' stock ownership. They were also challenged repeatedly by a group of three branch managers (Messrs. Rassin, Weller and Minnaert), who were secretly funded and directed by the defendants to oppose the plaintiff and the class by alleging that they represented the class' interests and that the transaction had been at a fair price. (*See e.g.*, App. J at 162a). Plaintiffs suspected, but discovered only later that this third-front group was actually a shill, financed and directed by the defendants and their counsel.

Following a bench trial, the United States District Court made findings and entered judgment in favor of the participant class, held that the $85.75 per share price paid

for the ESOP's 79,876 shares had been $70 per share less than fair market value, resulting in damages totalling $5,072,114.60 for the 72,458.78 shares owned by class members (reduced for the shares owned by defendants), plus post-judgment interest of $2,645,411.95, bringing the total damages to $7,717,526.55, as of December 31, 1997. *Montgomery v Aetna Plywood*, 39 F. Supp. 2d 915, 933-934 (N.D. Ill. E.D., July 16,1998). (App. H).

Thereafter, the parties entered into negotiations and reached a settlement of the claims for some $6.1 million cash, a previous partial settlement with the independent directors had produced an additional $800,000 for the 100-member class (App. L at 189a), plus restoration of 20% of the company's shares (*Id.* at 190a), plus an additional portion of the proceeds of a sale of the company within three years (*Id.* at 192a), plus the severance of Mr. Davis' connections to the company (*Id.* at 190a), and assignment of his shares to the class (*Id.* at 191a), plus the maintenance of the court's jurisdiction (*Id.* at 193a), and right of the class to contest the fairness of any "change of control transaction" by the company. (*Id.* ¶ 14 at 191a).

At the same time as the settlement was being presented to the district court for its approval, Davis had separately determined to have the company engage in a "reorganization" by issuing new shares, creating a new 80% interest, of which 29% went to Davis' counsel, and the remaining 51% control was issued for a token $4000 to the Rassin group (eventually adding a fourth member, one Scott Halden) that had shilled for the defendants and affirmatively fought the class repeatedly throughout the litigation, secretly financed and directed by the defendants Aetna, Davis and their counsel.

In accordance with the class' rights under the settlement agreement, class counsel objected to the "reorganization", insofar as it gave 51%-control to the friendly management group over class counsel's demand that other potential bidders be given an opportunity to buy or invest in the company at a fair value. And there were interested bonafide, capable bidders, recognized to have the wherewithal to buy or invest in the company for real value. One (the "Pacific Group") actually offered $7 million, subject to possible increase; another (the "McKillican group") indicated its desire to buy and its willingness to proceed ahead to negotiate an acquisition. A third group ("DN Partners") also initiated its evaluation for investment or acquisition.

Nonetheless, the management group simply rejected all such efforts and refused to deal with any other buyer than themselves and Davis' counsel indicated the company's determination to proceed with the "reorganization" unchanged.

Over class counsel's assertion that the *Revlon* doctrine required the directors to open the process for all bidders, to maximize value for the shareholders (who equitably were only the class, at this point), the district court refused to block the sale of control, misunderstanding that the shares issued by the company were Davis' to do with as he pleased, and advising class counsel: "I'm not your chancellor for life." (App. B at 26a).

On appeal, the seventh circuit acknowledged that the district court's reasoning had been faulty (since Davis' shares were being abandoned to the Class, the issue was whether the corporation could sell control to the Rassin group over the class' objections) but did not reach the merits of the

change in control dispute, then held that the ESOP class may have had standing under the Agreement and ERISA, but lacked derivative standing under Delaware corporate law to challenge it, because the wrong alleged — the agreement to sell 51% control for a mere pittance — had occurred during the period after the defendants had wrongfully redeemed the ESOP's shares, but before the class' equity ownership had been restored. (App. A at 8a-11a).

REASONS FOR GRANTING THE WRIT

I. The Court should declare that ERISA incorporate Delaware's *Revlon* doctrine.

The court should exercise this opportunity to flesh out its declarations in *Harris Trust and Savings Bank v. Salomon Smith Barney*, 530 U.S. 238 (2000), that ERISA incorporates trust law fiduciary duties, and entitles participants to "appropriate equitable relief" against fiduciaries and others, by adopting the *Revlon* doctrine, perhaps all the core Delaware corporate protections, as part of the federal courts' role "to develop a federal common law of rights and obligations under ERISA-regulated plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989).

This case presents a factual situation in which an ESOP class, first forced to pursue the litigation to the very end, in which it actually proved that it had been denied adequate consideration when its 95% ownership block was sold out from under them at less than fair consideration, was subsequently being defrauded by the same complicit group which was simultaneously diluting the equity interest being restored to the class by a settlement of the case. In such circumstances, the *Revlon* doctrine, *Revlon, Inc. v.*

MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. Supr. 1986) — that a corporate board which has decided to sell the company may not choose a favored buyer, but must instead fulfill a bedrock fiduciary duty to achieve the best possible price or transaction for all the shareholders — is widely recognized, cited and followed, without dissent. This obligation is triggered whenever the board has decided to engage in a change-of-control transaction. *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. Supr. 1994).

Whether viewed as a bargain sale of 80% shares to a favored management group in violation of its duty to maximize value for the corporation and its shareholders under *Revlon*[1] and its progeny[2], or as corporate waste from the

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1. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) ("*Revlon*"), invalidated a lockup adopted to favor management group over outside hostile bidder for control of company. It held that once the board of directors has decided to sell the company or otherwise engage in a "change of control" transaction, the Board's fiduciary duty changes from preservation of the corporate entity to maximization of the company's value at a sale for the stockholders' benefits. The decision to sell the company triggers a heightened duty to the shareholders which the directors "cannot fulfill . . . by playing favorites with the contending factions." *Revlon* at 184.

2. *See QVC Network, Inc. v. Paramount Communications Inc.*, 635 A.2d 1245, 1264 (Del. Ch. 1993) (proposed change in corporate control triggered heightened duty on target company's board to obtain reliable information about competing offers before business judgment rule could apply; adoption of antitakeover provisions invalidated as breach of fiduciary duty); *aff'd sub nom. Paramount Communications Inc. v. QVC Network, Inc.*, 637 A.2d

(Cont'd)

issuance of shares for no meaningful consideration[3], the

(Cont'd)

34, 48 (Del. 1994) (describing directors' duties when a corporation undertakes a transaction that will cause either a change in corporate control or a breakup of the corporate entity. Board has four obligations: (a) to be diligent and vigilant in examining the proposed transaction and competing offers; (b) to act in good faith; (c) to obtain, and act with due care on, all material information reasonably available, including information necessary to compare the competing offers or an alternative course of action which would provide the best value reasonably available to stockholders; and (d) to negotiate actively and in good faith with the various competing acquirers).

Compare Mills Acquisition Co. v. MacMillan, Inc., CCH Fed. Sec. L. Rptr. ¶ 94,071, 1988 WL 108332 (Del. Ch. 1988) (invalidating antitakeover poison pill provision, discussing "the . . . Board's bedrock fiduciary duty under Revlon, to achieve, in a sale of the company, the best possible price or transaction for the shareholders."), *with Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1990) (Board's decision to merge with another corporation was not a decision to put the corporation up for sale and did not trigger *Revlon* duty to either auction corporation or maximize short term shareholder value, absent any substantial evidence to conclude that board had made dissolution, sale or breakup of corporate entity inevitable).

3. *Sanders v. Wang*, 1999 WL 1044880 at *9-10 (Del. Ch. 1999), upheld a complaint against board for gross negligence, waste of corporate assets and breach of fiduciary duty for purporting to exercise discretionary plan administration powers in issuing shares to management group that exceeded explicit limitation on the total number of authorized shares under plan. The court described that an action for corporate waste must show that corporation received no consideration for the transferred asset: "The standard is stringent and requires that no person of ordinary business judgment would conclude that the deal was fair to the corporation."

(Cont'd)

issuance of the 51% control of a $10 million corporation to the Rassin group for a token $4000 constituted an indefensible breach of fiduciary duty,[4] no less bad faith than Davis' manipulative buyout of the class' 95% block that generated the litigation in the first place.

The court's treatment of the company's issuance of the dilutive shares, as if they were Mr. Davis' shares to transfer to whomever he wished, April 22, 1999 transcript at 2.[5] (App. D at 37a) was clearly wrong, because

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(Cont'd)

Thus, the issuance of stock to corporate officers for clearly inadequate value could be viewed as corporate waste or unjust enrichment — both breaches of fiduciary duty for which the appropriate remedies of disgorgement or constructive trust and return of shares to the corporation are available.

4. There was certainly no attempt to assert that the $4000 corresponded to any good faith bona fide value of the interest sold. Indeed, in their filings, Defendants essentially acknowledged that it was a token price and disavowed any obligation to ascertain fair market value for the interest. (R. 395 at 3-5). The Delaware Supreme Court's recent decision over the widely publicized $100 million severance package Disney President Eisner granted to his friend Michael Ovitz after a mere year as president, affirmed the dismissal of the original complaint, but granted the derivative plaintiffs the opportunity to rephrase their complaint with particularized facts creating a reasonable doubt that the board's decision was protected by the business judgment rule. *Brehm*, 746 A.2d at 267.

5. The Court:

> All right, there is a petition called petition for instruction. I am not sure of the format of it, but in any event, it has to do with the disposition of Mr. Davis' shares which were not part of the original settlement of

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(Cont'd)

the case. The proposal is to distribute, reissue the stock in a format that would result in the distribution of Mr. Davis's shares, some to the plaintiffs, some to an inside group, 51 percent as I understand it, and 29 percent to Mr. Collins and Mr. [Levin].

The result here as I see it is it's Mr. Davis's stock if he wants to distribute it. It was never part of the settlement that he had to surrender his stock ownership. The original judgment that I entered in this case was with respect to recovery of money. The parties then entered into settlement proposals and discussions and decided that there would be a settlement and an escrow arrangement.

Money was then produced to pay the liability claim which was somewhat reduced from what the amount would have produced in the event of a final judgment against the defendants.

That settlement was approved by the Court. Now, because of the jurisdiction of the Court over the company and the parties, approval was sought with respect to distribution of Mr. Davis' shares. Comments have been filed by the parties.

I am going to authorize the preparation of an order approving the transfer of stock as proposed by these parties who would receive the stock and with the conditions imposed that the plaintiffs' group would receive 20 percent of the stock as well.

You may draw an order to that effect.

(Tr. of April 29, 1999 Hr'g before Hon. Judge William T. Hart, at 2-3).

the settlement agreement required Davis to abandon his shares to the corporation. And while the court may well have tired of this battle by that time[6], the court still had jurisdiction and the class' interests were being violated by the defendants (then-sole Director Davis and the Company who were still fiduciaries to the class) and the Rassin group. Accordingly, the court could and should have protected them against being sold down the river by the defendants a second time.

II. The Court should also grant the writ to declare that ERISA also recognizes equitable standing, where appropriate, to remedy breaches that occur while a sold-out ESOP group lacks legal title to their shares because of the prohibited transaction at issue in the litigation

Parties who confer standing by contract should be equitably estopped from later challenging it[7]. Having

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6. *See* June 2, 1999 transcript at 2 (App. B at 26a):

> The court: "The case is over. I am not your chancellor for life here."

7. The panel's decision below goes off on the contract's lack of a specific provision referencing 8 Del. Code § 327. (App. A at 8a). But, if the class already had standing under the Code provision, then the contract language was unneeded surplusage. And if the defendants contracted that the class just had the right to pose the objection, then the statutory standing is unnecessary. The contract was simply drafted in the way it was, precisely to eliminate any discussion over whether the class had the right to challenge a bargain dilution sale to a favorable party who opposed the class. Invoking a separate requirement that the contract explicitly reference the Code section was unnecessary.

(Cont'd)

contracted to the class the right to assert these claims, the Aetna defendants should have been equitably estopped from denying the class' standing to challenge the bargain sale of control. *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 586 (7th Cir. 2000), (applying equitable estoppel against an employer's denial of coverage), all by itself, or by ERISA's adoption of the implied covenant of Good Faith and Fair Dealing, which is imposed in all Delaware Contracts. *See Merrill v. Crothall-American, Inc.*, Del. Supr., 606 A.2d 393, 2000 WL 121135, slip op. at 2-3.

The decisions below stand as broad exceptions to this court's rulings that ERISA standing is to be broadly construed and that a District Court's duty to exercise its jurisdiction may be abdicated "only in the exceptional circumstances where . . . [deferral or abstention] would clearly serve an important countervailing interest." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813-815 (1976). (Colorado River's own abstention rule would not apply here in any event).

The quasi-abstention and standing barriers erected by the courts below also conflict with ERISA's basic purposes and this court's direction that ERISA standing is to be broadly interpreted and jurisdiction may be declined in very limited circumstances.

(Cont'd)

Moreover, the Seventh Circuit's ruling frustrates the intentions of settling parties, and encourages those who agree to contracted obligations to just ignore them, because the court will entertain additional defenses asserted by those who wish to evade their agreed-to obligations under a settlement. Similarly, it sends the message that people who settle cannot rely upon the court to enforce settlement agreements according to their terms. Such a policy also conflicts with the federal courts encouragement of resolution by settlement.

The court should also make it clear that the standing to assert this claim in an ERISA context should be determined to broadly effectuate its purpose of protecting beneficiaries' interests:

> It is intended that coverage . . . be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs.

S. Rep. No. 93-127, 93d Cong., 1st Sess. 18 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 4838, 4854 and 1 ERISA Leg. History 604.

In the context of ERISA litigation over the bargain purchase of the ESOP's 95% equity stake as a prohibited transaction at an unfavorable rate, for inadequate consideration, where the class' settlement agreement is being duplicitously diluted by a secret side reward to three class members who repeatedly shilled for the defendants against the class' interests, ERISA's purpose of protecting employees generally affords standing on a liberal basis, where needed for workers' protection. Case law amply supports a liberal, not hyper technical, construction of standing, in order to ensure that workers' retirement rights are protected. *See Kingsbridge Capital Group v. Dunkin' Donuts, Inc.*, 1989 WL 89449 (Del. Ch. 1989); *see also Lehmann v. Brown*, 230 F.3d 916 (7th Cir. 2000); *Maher v. Strachan Shipping Co.*, 68 F.3d 951, 957 (5th Cir. 1995); *Sommers Drug Stores Co. Employee Profit Sharing Trust*, 883 F.2d 345 (5th Cir. 1989); *Wells v. United States Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1251 (6th Cir. 1992); *Duckworth v. Pratt & Whitney, Inc.*, 152 F.3d 1 (1st Cir. 1998) ("employee" may include prospective

employees); *Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1994); *Yarde v. Pan American Life Ins. Co.*, 67 F.3d 298 (4th Cir. 1995).

Delaware's equitable standing doctrine is peculiarly appropriate for a plan whose shares have been sold out from it in a prohibited transaction and needs protection from being diluted out of its bargained-for restored equity.

The decision of the court below — that a class with standing[8] under contract and ERISA should nonetheless be

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8. Of the three types of standing, the class satisfied all three. The first, an Article III hurdle of injury in fact, that is fairly traceable to the defendants, and is redressable by a favorable judicial ruling, as described by *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972) — requiring that the plaintiff have "a personal stake in the outcome of the controversy . . . as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution" — was not disputed.

The second, a "prudential" standing requirement — that the plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit — was also clearly met. The class was the ESOP shareholder group whose 95% ownership block, the district court found, had been involuntarily redeemed by the Aetna defendants at some $7 million less than adequate consideration, and who were in the process of settling those claims with the Company by cash, plus a restored equity ownership in the company. As such, they were already in litigation over the manner in which their shares had been lost, by a breach of fiduciary duty, when the defendants breached their fiduciary duties by duplicitously diluting the interest being restored to the class. (App. H).

(Cont'd)

denied standing at all to challenge the bargain dilution of their to-be-issued shares by the simultaneous bargain sale to a complicit management group — poses a real threat to the protection of an ESOP class. This court should declare that, once Article III standing exists, ERISA affords standing, without additional hurdles, where standing to raise the particular claims exists from either explicit contractual terms[9], or equity.

(Cont'd)

It is the third type of standing — the procedural prerequisites to a party's bringing the particular type of claim — that appears as the panel's basis for denying standing herein (App. A at 24a), that is that the ESOP class — who the district court found had been unfairly redeemed out of its interest in the transaction being challenged from the beginning was somehow now to be required to surmount a newly erected hurdle in order to proceed, and had entered into a settlement agreement obligating the Company to restore a 20% common stock stake (App. L at 190a) — was still not then technically a shareholder who could complain about the company's simultaneously adopted "reorganization" plan to reorganize by selling 51% control for a mere $4,000, never asserted to be a fair value for the stake. (App. A at 6a).

The panel's technical denial of standing, on the ground that the class was not technically a shareholder at the time that the reorganization was approved by the company, although not effected until the Class' shares had been restored, ignored the settlement contract's explicit grant to the class of the right to have the fairness of any such change of control transaction decided by the court, and the ERISA purpose to protect participants, and the Delaware Corporate law's equitable standing concepts, all of which support the class' standing to block the obviously unfair sale of 51% control to a favored group of managers for a mere $4,000.

9. As the panel acknowledged, the contract explicitly grants the Class standing to raise this issue and have it addressed by the court. (App. A at 10a).

Moreover, Delaware's equitable standing rule would appropriately empower ERISA plan participants to protect themselves from the dilutive bargain sale of control here. In *Shaev v. Wyly*, 1998 WL 13858 (Del. Ch. Jan. 6, 1998), a shareholder of a top-tier parent brought a derivative action to challenge the spin-off subsidiary's grant of excessive options to its officers and directors. Similar to the situation here, the defendants moved for summary judgment that the plaintiff lacked standing because he had not brought his action originally as a double derivative action, did not become a direct shareholder of the spin-off company until after the option grant, and was not a shareholder of the subsidiary after the spin-off was complete. But, regardless of the three strikes against the plaintiff, the Delaware Chancery Court followed clear Delaware precedent that rejects the strict application of technical legal standing rules that would insulate the wrongdoers from suit. Citing *Helfand v. Gambee*, 136 A.2d 558 (Del. Ch. 1957), Vice Chancellor Steele held that the aim of the statutory provision "would not be served by denying plaintiff standing to sue. . . . To the Contrary, to deny standing on these facts would insulate defendants from potential liability for their alleged misdeeds. . . .

> Plaintiff, as a Software shareholder, had the right to bring a double derivative action on behalf of Commerce for a period of months. Why he did not do so is unclear. I decide only that Software's decision to divest itself of its entire interest in Commerce cannot, as a matter of law, deprive plaintiff of standing to bring a derivative action on behalf of Commerce, even where the challenged actions occurred before plaintiff owned shares in Commerce.

1998 WL 13858 at *4-5.

On reconsideration, Vice Chancellor Steele reaffirmed his position:

> Here, plaintiff lost his chance to file a double derivative action because, after the spin-off, Software and Commerce were no longer in a parent/subsidiary relationship. Were this Court to apply section 327 strictly, plaintiff would also be barred from filing a derivative action. Under those circumstances, I refuse, as I believe one charged with the duty to apply equitable principles must, to adhere blindly to a technical legal rule and to allow thereby an alleged corporate wrongdoer to thumb his nose at the possibility of redress. Thus, I found that plaintiff has equitable standing to bring a derivative action on Commerce's behalf, notwithstanding the fact that the challenged actions occurred before he owned any Commerce shares. I reconsidered my finding in light of the defendants' repeated arguments and reexamined my role as a member of a court charged to see that equity be done, and I decline to alter my conclusion on this issue.

Shaev v. Wyly, 1998 WL 118200 (Del. Ch. March 6, 1998) (denying defendants' motion for reargument).[10] The equities of this case were much more compelling. Here, the reorganization's bargain sale of control to the three branch

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10. On the defendants' interlocutory appeal of the ruling, 1998 WL 155540 (March 26, 1998), the Delaware Supreme Court heard briefs and arguments on the issue, and "affirmed on the basis of and for the reasons assigned by the Court of Chancery in its letter opinions . . . dated January 6, 1998, and March 6, 1998." *Wyly v. Shaev*, 719 A.2d 490 (Del. Supr. October 1, 1998).

managers who had shilled themselves for the Aetna/Davis defendants stands as quite squarely Mr. Davis' duplicitous device to thwart the redress achieved in the case for the class, no less than the original 1992 transaction. Similar to Mr. Davis' buyout of the ESOP's 95% shares at less than half of fair value, his giveaway sale of control to the branch managers intentionally diluted the ESOP class' shares in clear violation of any reasonable conception of good faith and fair dealing.

CONCLUSION

Wherefore, petitioner requests that this court grant him and the class a writ of certiorari to review the decisions of the courts below, reverse, and find that the class has appropriate standing to challenge the bargain sale of the 51% control block to the Rassin group, invalidate the "reorganization" of Aetna Plywood, Inc. by cancelling the control shares issued to the Rassin group, declaring them held in a constructive trust for the company or otherwise invalidating their bargain sale.

Respectfully submitted,

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